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No. 01-

IN THE

Supreme Court of the United States

CHARLES PHILIP AKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the retrospective application of a Social Security Administrative ruling interpreting vague definitions in the Social Security Act effective September 18, 1996 can be used as a basis for a criminal prosecution which was commenced on May 7, 1997 for alleged criminal conduct between November 1991 through July, 1993 constitutes an clear violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Whether Petitioner was unconstitutionally sentenced under an increased offense level under the Federal Sentencing Guidelines based upon facts that were not included in the indictment nor proven at trial beyond a reasonable doubt.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 16, 2001 affirming Petitioner's conviction and sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, but is reproduced at Appendix A.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its unpublished opinion on May 16, 2001 affirming the judgment and sentence entered on February 11, 2000 in the United States District Court for the Western District of Texas, San Antonio Division, Hon. H. F. Garcia presiding.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATION INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, as well as 42 U.S.C. § 1395x(5)(9); 42 C.F.R. § 410.100(g)(1); and 42 C.F.R. § 410.36(a)(3). The pertinent portions of these can be found reproduced at Appendix E.

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner, Charles Philip Akin and two co-defendants, were charged on May 7, 1997 in an eighty-eight count indictment in the Western District of Texas, San Antonio Division, with a general conspiracy to commit fraud (18 U.S.C. § 371) multiple counts of mail fraud (18 U.S.C. §§ 1341 & 2) money laundering (18 U.S.C. § 1956(a)(1)(A)(i)) and submitting false claims (18 U.S.C. § 287).

On June 14, 1999, trial commenced, and on June 29, 1999 the jury returned verdicts of guilty on all counts. On February 24, 2000 Akin was sentenced to 87 months imprisonment to run concurrently on all counts. In addition, he was ordered to pay a special assessment totaling $3,650 and to make restitution of $1,108,775.90 to Medicare/ Medicaid. Petitioner filed a pre-trial Motion to Dismiss the indictment. After an evidentiary hearing the Magistrate Judge recommended denial of the Motion to Dismiss. Akin filed objections to the Report and Recommendation, which the trial court impliedly overruled when trial began.

On June 28, 2000, Petitioner self-surrendered without incident to the United States Marshal's Service. On July 17, 2000, he was transferred to FCI Bastrop in Bastrop, Texas, where he remains detained at the Federal Prison Camp.

B. The Relevant Facts

Charles Philip Akin is a sixty-six year old dentist from Austin, Texas, who was engaged in a medical supply business from 1991 to 1993. He invested $257,000 in a corporation,

BioTex, Inc., which was selling a body support product, for which the corporation had been receiving reimbursement from Medicare. Akin formed a corporation, Health Care of Texas, Inc., for the purpose of selling the product to nursing homes. Co-defendants Henderson and Gurasich sold the same product through an Austin-based business called Continental Health. Between February 1992 and June 1993 Akin submitted claims to the Medicare regional carrier, Blue Cross & Blue Shield of Texas (hereinafter "Blue Cross")[1] for body or lumbar supports used by nursing home residents confined to wheelchairs. The claims were for "orthotic devices," reimbursable by federal regulation, which describes them as "orthopedic devices that support or align movable parts of the body, prevent or correct deformities, or improve functioning." 42 C.F.R. § 410.100(g)(1).[2] Akin's device, which fitted into the wheelchair, had adjustable sides and front pads, rigid side and base inserts, was held by adjustable clasps and straps and used pads. It kept patients upright, aligning their spine and hips. Defense witness, Dr. David Abbott, who signed most of the certificates of medical necessity which accompanied Akin's claims, testified that wheelchair bound patients who could not maintain normal posture developed ulcers and other serious physical problems if not properly positioned in their chairs.

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1. Blue Cross later became Texas/Trailblazer Health Enterprises.

2. "Durable medical equipment" is paid for under Part B of Medicare if it is medically necessary equipment used for treatment of decubitus ulcers, and it is ordered in writing by the beneficiary's physician, who will be supervising its use in the course of treatment. 42 C.F.R. § 410.38(d).

Akin submitted his claims to Blue Cross for a "lumbar-sacral support system," accompanied by a certificate of medical necessity which stated that the condition for which the device was needed was "patient is wheelchair confined with inability to maintain proper body alignment when sitting." Typical medical diagnoses on the certificates were "dementia," "Alzheimers," or "osteoarthritis." Akin's claims for reimbursement were made under Code L0430, which appears under the heading "Orthotics" in a Medicare Part B handbook on durable medical equipment for doctors and suppliers. Code L0430 is defined in the handbook as "TLSO, anterior-posterio-lateral control (body jacket), with interface material, custom fitted."[3] A device similar to that sold by Akin's company was marketed to the Veterans Administration by Akin's former associate, Bowman, who testified as a government witness. Other similar devices were routinely paid by Medicare carriers in other parts of the country.

Prior to Akin's investment in BioTex, Inc., the Health Care Finance Administration (HCFA) issued a letter stating that "custom designed orthotic *seating and positioning systems* . . . may be covered under Part B of the Medicare program." No official statement of the Department of Health and Human Services or HCFA regarding "orthotics" or "body jackets" was issued after that date until a "national policy" was publicly stated in September 1996, three years and three months after the last claim submitted by Akin which the government alleges was "fraudulent." This national policy

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3. "TLSO" makes reference to "Thoracic Lumbar Sacral Orthotic." 42 U.S.C. § 1395x(n) provides that Medicare Part B precludes coverage of durable medical equipment used in a hospital (42 U.S.C. § 1395(e)(1)) or a skilled nursing facility (42 U.S.C. § 1395i-3(a)(i)).

stated that those terms applied only to rigid devices that tightly fit and immobilize the body, language not included previously in any regulation, directive, or guideline. This policy was issued after an Administrative Law Judge ruled on January 3, 1996 that equipment similar to Akin's which was used for wheelchair seating and body positioning constituted a reimbursable brace or orthotic. This holding was affirmed by a Medicare carrier appeals board. On February 9, 1996 a Medicare carrier hearing officer reached the same conclusion. These decisions were the first definitive statements of the law as to the interpretation of devices similar to Akin's.

The government contended that Akin committed fraud, however, by falsely claiming Between February 1992 and June 1993 that his devices were reimbursable "orthotic devices," billed under Code L0430, when they were in reality "non-orthotic medical equipment." The government contended that Akin knew that this was a false designation because in August 1992, after Akin had submitted and received payment for his devices from Blue Cross, the carrier published a newsletter in which it stated that Medicare had identified a product being billed under Code L0430 which "consist[ed] of a seat and back, is constructed of foam rubber covered by vinyl and held together with straps and Velcro." The newsletter claimed that Medicare had determined that the product did not meet the code definition in the handbook because it "represents a safety and postural device used in wheelchairs that is not covered by the Medicare program." Akin discussed this with the manufacturer of his product, who was satisfied that it did not describe the product he was making for Akin to distribute. Akin's device provided full body support, has adjustable sides and front pads, is made with rigid side and base inserts and is held by adjustable clasps and straps rather than Velcro. Subsequently, Blue Cross continued to pay Akin's claims until June 1993.

In late September 1993, Blue Cross adopted a "policy" stating that equipment claimed under Code L0430 must, among other things, "be used to immobilize the specified areas of the spine," and may "not [be] specifically designed for patients in wheelchairs." In 1994, after the last date of fraudulent billing alleged by the government, the Department of Health and Human Services conducted a study which *recommended* that Code L0430 be used only for rigid plastic devices not used in wheelchairs. The study acknowledged that Code L0430 provided only a "vague" and "general description," and that it contained loopholes which allowed suppliers to claim other devices as meeting the definition. The study was based in large part on interviews with orthotists and doctors who designed equipment which competed with equipment of the type sold by Akin.

The government produced witnesses at trial who rendered their opinion as to the applicability of Code L0430 to Akin's devices and testified to varying remarks from family members of patients. Dianne Cassen, a physical therapist, testified over objection that in her opinion that Akin was using the wrong code for his billing, that his product was durable medical equipment and that the product was not reimbursable. Her opinion was based in part on hearsay testimony that "Medicare" had told her that if a product is profitable quickly it is probably "not okay." Conrad Bowman, a former marketing associate of Akin's co-defendants who became a competitor by selling a similar device from Mississippi to the Veterans Administration, testified as to his opinion that L-Codes require an prescription by an orthotist (a medical specialist in orthotics). Over objection he testified that it would be fraud to bill Akin's device as a "body jacket." His testimony contrasted with the testimony of Dr. Rodney Carry, a nursing home physician, who testified

that he had been a physician for twenty years, but did not know what a "body jacket" is. He testified that the term "orthotic" was nonspecific, applicable to multiple devices which support a weak or injured body member. He also testified that Petitioner's exhibits D1 through D4 were, in his experience and training, orthotic devices.

Petitioner argued to the Court of Appeals that the underlying definitions of an orthotic device was void for vagueness and was in violation of the Fifth Amendment. The Court of Appeals gave short shrift to this argument stating the following:

> On appeal, Akin raises several points of error. First, he contends that the indictment should have been dismissed because the basis for those charges was a vague and indefinite Medicare claims code, which failed to give him fair notice of the illegality of his conduct. . . . we conclude that the district court did not commit reversible error with respect to the point[s] raised by Akin.

(*See* Appendix A.)

REASONS FOR GRANTING THE WRIT

A. In affirming the Petitioner's conviction, the United States Court of Appeals failed to address and rule upon an important substantive constitutional question- whether the retrospective application of an administrative ruling which imposed criminal liability on Petitioner is a clear violation of the Due Process Clause of the Fifth Amendment to the Constitution by criminalizing sanctioned conduct prior to the administrative ruling.

The case at bar presents an unusual and unique constitutional question which counsel believes has not been directly addressed by this Court in a federal criminal case.

This Court has spoken to the rule of lenity in *Babbitt v. Sweet Home Chapter of Communities For A Great Oregon*, 515 U.S. 687, 115 S. Ct. 2407 (1995) in the context of legislation and regulatory interpretation:

> . . . The rule of lenity is premised on two ideas: First, " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' "; second "legislatures and not courts should define criminal activity." [citing cases] . . . Even if there exists regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity . . .

Id. at 704 n.18.

With this perspective of the rule of lenity, this Court should view the instant controversy regarding the ambiguous and vague definitions, which were the underlying basis for the criminal charges brought against Akin, and which has a long and tortuous administrative and judicial history.

The controversy over the ambiguous and vague definitions, which were the underlying basis for the criminal charges brought against Akin, has a long and tortuous administrative and judicial history. *In re OrthoConcepts v. MetraHealth*, Dkt. No. 000-45-1375 (Social Security Administration Office of Hearings and Appeals Decision dated January 3, 1996) the Administrative Law Judge held that an orthotic device similar to that for which Akin is charged with committing fraud was an orthotic device which met the requirements for reimbursement. (*See* Appendix B). Subsequently, the Department of Health and Human Services, Health Care Financing Administration (HCFA) issued its ruling *HCFAR-96-1* (*See* Appendix C) effective September 18, 1996 which "provide[d] clarification and interpretation of complex or ambiguous provisions of the law or regulations relating to Medicare, Medicaid, Utilization and quality Control Peer review and related matters". This ruling in effect determined that the orthotic device which was similar to the device sold by Akin's company was not reimbursable. The HCFA ruling (HCFAR-96-1) resulted in a civil law suit entitled *Warder v. Shalala*, (1997 WL 263733, 1997 U.S. Dist. Lexis 7029)[4] which was decided May, 1997 wherein District Judge Lasker held that the orthotic device under the same billing code which Akin had billed was reimbursable stating "[i]t is not necessary, however to decide

4. The decision gives a full history of the underlying controversy as to the ambiguity in the law and regulations and the interpretation given by HCFA.

that the bracing systems do not satisfy the DME[5] definition in order to conclude that *the government cannot use a purported ambiguity created by the devices falling within two coverage categories to classify them as DME.*" [Emphasis supplied] Judge Lasker held that OrthoConcepts was entitled to reimbursement. Judge Lasker's decision was appealed to the United States Court of Appeals for the First Circuit and was reported in *Warder v. Shalala*, 149 F.3d 73 (decided July 27, 1998). The First Circuit held in reversing Judge Lasker's decision that HCFAR 96-1 was an interpretative ruling which did not need notice and comments procedures under the Administrative Procedure Act. Thus, the courts should give deference to the administrative determination.[6] This Court denied certiorari. 119 S. Ct. 1455.

This Court in a civil context has decried the use of retroactive curative cost-limit rule making under the Medicare Act noting that retroactivity is not favored in the law. *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988). As Mr. Justice Scalia stated in his instructive *Bowen* concurring opinion discussing the distinction of rule making and adjudication "a rule is a statement that has legal consequences only for the future". *Id.* at 476. "Adjudication deals with what the law was; rule making deals with what the law will be". *Id.* at 478 "Quite simply, a rule is an agency statement of 'future effect' *not* 'of future effect and/or *reasonable past effect*' ". Emphasis supplied. *Id.* at 478. "It is important to note that the retroactivity limitation applies only to rule making". *Id.* at 480. Thus, this Court, in the

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5. DME makes reference to "durable medical equipment."

6. The First Circuit did not reach the question of retroactivity.

context of the case at bar, has impliedly given guidance that the HCFR-96-1 ruling of September 1996 has prospective application only and should not have been used as a basis to criminalize prior sanctioned conduct.

It is with this tortuous administrative and judicial background in dealing with Social Security's vague definitions[7] of orthotic devices and durable medical equipment that Akin became subject to criminal prosecution on May 7, 1997.

In the District Court, Akin moved to dismiss the indictment on the ground that the definition of orthotic devices, which were reimbursable under the Medicare laws, was void for vagueness. The motion was the subject of an evidentiary hearing before the Magistrate Judge. In her Memorandum and Recommendation, the Magistrate Judge acknowledged that the coding for orthotic devices in the Medicare Carrier Claims Manual (L0430) was ambiguous before September of 1996, but recommended that the question of whether the device which was the subject of the indictment was an orthotic device be submitted to a jury.[8] (*See* Appendix D). Petitioner's objections to the Memorandum and Recommendation were overruled by

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7. The Eleventh Circuit in *Georgia Pacific Corp. v. OSHRC*, 25 F.3d 999, 1005 (1994) has held that where the Secretary of Labor is unable to settle upon a single definition of a critical term or phrase of its own regulations, the regulation is unconstitutionally vague.

8. Contrary to the U.S. Magistrate Judge's recommendation, the question of the ambiguity of a government regulation is a question of law for the judge and not for the jury. *United States v. Upton*, 91 F.3d 677, 683-84 (5th Cir. 1995) The Fifth Circuit refused to address this issue in its unpublished opinion in this case.

implication when the case proceeded to trial without a formal ruling by the District Judge. The Magistrate Judge's factual findings are sustained on appeal unless they are clearly erroneous, and her recommended conclusions of law are reviewed *de novo.*

At the close of the government's case-in-chief, the Petitioner moved for a judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure, which motion was denied. The motion was renewed at the end of all the evidence, and again the motion was denied. Motions for judgment of acquittal are questions of law which are reviewable by this Court *de novo. United States v. Ferguson*, 211 F.3d 878 (5th Cir. 2000); *United States v. Reliford*, 210 F.3d 285 (5th Cir. 2000). Constitutional challenges to government legislative authority are also reviewed *de novo* on appeal. *United States v. Howard*, 220 F.3d 645 (5th Cir. 2000). The court below declined to review Akin's constitutional challenge.

The undisputed evidence at the hearing and at trial showed that at all times charged in the indictment — that is, between June 24, 1992 and June 8, 1993 — there was no directive, order or regulation specifically excluding the device which was the subject of the indictment in this case from coverage as an orthotic under Code L0430. It was not until *after* Dr. Akin had submitted all the claims which were specified in the indictment that an investigation was conducted by the Health Care Financing Administration ("HCFA"). The investigation resulted in a recommendation to the Department of Health and Human Services in April 1994 that more "stringent controls" be instituted to limit payments for orthotic "body jackets," because the applicable code used in billing — L0430 — provided only a "vague"

and "general" description that allowed Medicare suppliers to file claims for other devices. It was not until September 1996 that a HCFA ruling stated a policy regarding the distinction between "orthotics" and "durable medical equipment" and defined an "orthotic device" as a "brace used independently of other equipment." This ruling specifically stated that the purpose of an HCFA ruling is to "provide clarification and interpretation of complex or ambiguous provisions of the law or regulations. . . ." , and was the first official statement by the Department of Health and Human Services relating to the device for which Akin had submitted claims almost four years earlier. In the meanwhile, other regional Medicare carriers had ruled that devices similar to that which was the subject of the charges against Akin, were indeed Medicare-reimbursable orthotics, and two hearing officers had held the same. Contrasted with these belated rulings was the evidence submitted by Akin that *prior* to the marketing of his device, the HCFA issued a letter in 1990 stating the "custom designed orthotic seating and positioning systems . . . may be covered. . . . under the Medicare program". Akin further produced evidence that in 1992 and 1993 some Medicare carriers were allowing payment for similar devices while others were not — a clear indication that no one individual could look at the applicable statutes and regulations and determine what devices could properly be submitted for coverage.

It is the most basic proposition of due process under the Fifth Amendment to the Constitution that a person cannot be held criminally accountable for conduct for which he has no notice of its prohibition. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). An individual is not required to guess or speculate about whether his conduct is forbidden by law: a legal prohibition must be sufficiently clear that

ordinary persons can understand what conduct contravenes the law. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). If the terms of the law are so vague that individuals must necessarily guess at its meaning and differ in its application, it does not give "fair warning," and consequently violates the Fifth Amendment Due Process provisions. *United States v. Lanier*, 520 U.S. 259, 266 (1997). If under a law applicable to persons nationwide there is disagreement among those charged with execution of the law as to the appropriateness of payment for a device, the first question to be asked is whether the disagreement stems from ambiguity, vagueness or indefiniteness in the law. In the case at bar, the applicable regulations were treated variably from jurisdiction to jurisdiction for six years, which is a clear sign of ambiguity, vagueness and indefiniteness. It is plain from the regulations themselves defining durable medical equipment and orthotic devices, that the position taken by the government in the case at bar was unduly restrictive, given the broad and inclusive language of the definitions prior to September, 1996.[9]

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9. The court below declined to address the rule of lenity in the case at bar. However, in *United States v. Marek*, 238 F.3d 310 (5th Cir. February 2, 2001) the court did address this issue, even though it found it not applicable, by stating

> The rule of lenity-a rule of narrow construction rooted in concern for individual rights, awareness that it is the legislature and not the courts that should define criminal activity, and belief that fair warning should be accorded as to what conduct is criminal-applies when, but only when, "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute". . . . The principle behind the rule of lenity is that no one should be forced to speculate whether her conduct is prohibited. *id.* at 322.

The Fifth Circuit has considered, and spoken on, the question of criminal liability in the face of a dispute among proper authorities on the meaning of the law. *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). In that case the defendant, who had an extremely rare blood antibody, had sold her plasma on a contractual basis to a laboratory. She did not report any of the sums received on her tax return, believing that it did not meet the definition of income. There was no definitive court ruling on the issue during the relevant time period, and both sides produced expert testimony at trial to testify to opposing interpretations of the law. The Court held that willfulness is an essential element of tax evasion, but that "[a] tax return is not criminally fraudulent simply because it is erroneous." *Id.* at 97. The Court said that

> The unresolved nature of the law is relevant to show that defendant may not have been aware of a tax liability or may have simply made an error in judgment.

Id. at 98.

In the case at bar, given the government's admissions of vagueness and ambiguity, the basing of a criminal prosecution on a policy statement issued 3 to 4 years *after* the conduct charged in the indictment violates the Due Process Clause prohibitions of the Fifth Amendment. The distinction between an orthotic device and durable medical equipment requires expert analysis and should be highly detailed in the regulations. Otherwise, the legislature's authority to determine forbidden conduct is "impermissibly delegate[d] . . . to policemen, judges and juries for resolution on an ad hoc, subjective basis, with attendant dangers of

arbitrary and discriminatory application." *Grayned v. City of Rockford*, *supra* at 108-09. *Accord*, *Smith v. Goguen*, 415 U.S. 566, 575 (1974). That is precisely what happened in this case: the HHS agent and the prosecutor arbitrarily applied their personal interpretation of the relevant regulations and proceeded with the prosecution on the basis of a theory, which was untested and unresolved by any competent authority, judicial or executive at the time of the conduct which they charged was felonious. Further, there was no evidence that the Medicare carrier, who has no constitutional authority to define criminal conduct, rejected the billings submitted by Akin or his associates, nor gave him any written notice that the specific device in issue in this case would not be covered.

To prove intent to defraud, the government must show that Akin intentionally deceived the Medicare carrier by submitting claims that he knew were false. *See, e.g.*, *United States v. Keller*, 14 F.3d 1051 (5th Cir. 1994); *United States v. Phillips*, 600 F.2d 535 (5th Cir. 1979). Fraud is a matter of deliberate deception. *United States v. Phillips*, *supra* at 537. An individual cannot be guilty of an intentional crime, much less one with the particular burden of proving fraudulent intent, on the basis of a confused, vague and indefinite administrative ruling. While knowledge of legal requirements is a legitimate requirement of anyone dealing with taxpayer funds, those legal requirements should be readily ascertainable and plain in their meaning and application. In this case one cannot be guilty of fraudulently billing devices fully accepted as lawful submissions in another jurisdiction. Further, a Medicare official personally testified for the Petitioner that in her opinion the device was orthotics. Dr. Kaye Jewel, who was Medical Director for Wisconsin Medicare Part B Carrier and medical officer at

the Health Care Financing Administration in Baltimore and Washington, D.C., working on policy statements testified that if there is no specific instruction about a particular device, then "you go with what most fits the function of the code." She further testified that "if it meets the actual descriptors, then it can be coded under L0430." Also included in her testimony was a description of the controversy among state medical directors and within the HCFA as to whether devices similar to Akin's which provided lumbar and/or sacral support were orthotics or some other form of "durable medical equipment" not reimbursable by Medicare which were furnished in a nursing home. "A criminal proceeding is an inappropriate vehicle for pioneering interpretations of . . . law." *United States v. Garber*, *supra* at 100. At the time of the alleged offenses there was no clear interpretation of federal regulations pertaining to orthotic devices such as Dr. Akin claimed his to be.[10] Therefore, he could not, as a

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10. As Mr. Justice Marshall stated in a statutory context (not in an administrative ruling context) in *Dunn v. United States*, 442 U.S. 100, 112-113 (1979):

> To characterize such an interview as an ancillary proceeding would not only take liberties with the language and legislative history of Sec. 1623, it would also contravene this Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity. [citing cases] This practice reflects not merely A convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at his peril of indictment whether his conduct is prohibited. [citing cases] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts decline to impose punishment for actions that are not "plainly and unmistakably" proscribed.

matter of law, have intended to defraud the government, which could not decide the question for itself.

Dr. Akin's motion to dismiss and/or motion for judgment of acquittal should have been granted by the trial court.

B. The Petitioner was unconstitutionally sentenced under an increased Offense Level of 29, based upon facts that were not included in the indictment nor proven at trial beyond a reasonable doubt.

The Circuit Court in its unpublished opinion also gave short shrift to Petitioner's constitutional challenge to his sentence by dismissing the argument as having no merit. However, this Court has remanded to the various courts of appeal *Apprendi* issues, similar to the issue raised above.[11]

Petitioner's sentence was unconstitutionally enhanced at sentencing by the District Court based on a preponderance of evidence standard, without the jury's finding of guilt beyond a reasonable doubt on certain facts that were not

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11. *Burton v. United States*, 121 S. Ct. 32 (2000); *Wims v. United States*, 121 S. Ct. 32 (2000); *Gibson v. United States*; 121 S. Ct. 31 (2000); *Blue v. United States*, 121 S. Ct. 32 (2000); *Brown v. United States*, 2000 U.S. LEXIS 6603; *Clinton v. United States*, 2000 U.S. LEXIS 6605; *Hughes v. United States*, 121 S. Ct. 423 (2000); *Curry v. United States*, 121 S. Ct. 376 (2000); *Hester v. United States*, 121 S. Ct. 336 (2000); *Smith v. United States*, 121 S. Ct. 336 (2000); *Twitty v. United States*, 121 S. Ct. 559 (2000); *Potts v. United States*, 121 S. Ct. 559 (2000); *Meais v. United States*, 121 S. Ct. 559 (2000); *Humphrey v. United States*, 121 S. Ct. 478 (2000); *Knight v. United States*, 121 S. Ct. 478 (2000); *Whitt v. United States*, 121 S. Ct. 423 (2000). *See also Travis Randle v. United States*, 2001 WL 81170 (5th Circuit decision July 17, 2001) where in the Court reversed a sentence on similar ground.

included in the indictment.[12] These enhancements were proposed by the U.S. Probation Officer, argued by the Government and ordered by the court based upon the preponderance of evidence standard outside the jury's finding and after the jury had been discharged.

At sentencing, Petitioner's base offense level was established to be level 23 pursuant to U.S.S.G. § 2S1.1. As such, Petitioner was enhanced four (4) levels for being a leader and organizer based on the preponderance of evidence standard resulting in an approximate 30 months of additional incarceration. Petitioner was neither charged in the indictment for this conduct nor was the jury given any indication under the pleadings that Petitioner was subject to such an enhancement if found guilty. Additionally, Akin's Total Offense Level was enhanced two (2) levels for $328,855.15 for "value of the funds" based on the preponderance of evidence standard resulting in 11 months more incarceration regarding the money laundering counts. This amount of money was not pled in the indictment, as the Government conceded (*See* Government's Addendum Objections to PSI and additionally, U.S. Position Regarding: (1) Defendant's Objections To PSI; and (2) Money Laundering Calculations, filed under seal), nor was the jury given any indication that Akin was subject to such an enhancement if found guilty on this fact.

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12. The Fifth Circuit on July 19,2001 held in *United States v. Gonzalez*, __ F.3d __, 2001 WL 815606 in deciding an *Apprendi* issue in a drug case that failure to allege an amount of drugs in an indictment, submit it to a jury and prove it beyond a reasonable doubt affected the defendant's substantial rights. The Fifth Circuit in the case at bar failed to address this very same issue which raised by Akin.

Under the Sixth Amendment to the U.S. Constitution, Petitioner's rights indisputably entitled him to a jury determination of guilt on every element of the crime with which he is charged beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506 (1995) *cited* by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Further, Petitioner's sentence violates the Sixth Amendment and his due process rights under the Fifth Amendment.

In *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000) the Fifth Circuit held that *Apprendi* did not clearly resolve whether an enhancement which increases a sentence within the statutory range but which does not increase the sentence beyond that range must be submitted to the jury and proved beyond a reasonable doubt. *Meshack, supra* at 576. Although the Court found the above reading of *Apprendi* plausible, it took the more limited reading of *Apprendi* which requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment beyond the prescribed statutory maximum. *Appendi, supra* at 2380. Any amount of excess jail time has Sixth Amendment significance. Additionally, the Court in *Meshack* stated that the *Apprendi* majority expressly declined to reverse an earlier opinion allowing a judge to determine by a preponderance whether an enhancement should apply, instead limiting that case's "holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Meshack, supra*, quoting *Apprendi*, 120 S. Ct. at 2361 n.13 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and noting that it might reconsider the holding in the future). The Fifth Circuit in the case at bar, declined to entertain Petitioner's constitutional challenge to his sentence stating that the District Court committed no error in the sentencing of Petitioner.

Petitioner's sentence was enhanced beyond the statutory maximum permitted and contrary to the dictates of *Apprendi* and therefore was unconstitutional.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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